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9 UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,

No. 23-cr-00450-MEMF

13 Plaintiff,

GOVERNMENT'S EVIDENTIARY HEARING
MEMORANDUM

14 v.

Hearing Date: April 26, 2024
Hearing Time: 3:00 p.m.
Location: Courtroom of the
Hon. Maame Ewusi-
Mensah Frimpong

15 ABRAHAM SALCEDO,

16 Defendant.

18 Plaintiff United States of America, by and through its counsel
19 of record, the United States Attorney for the Central District of
20 California and Assistant United States Attorney Aylin Kuzucan, hereby
21 files its Evidentiary Hearing Memorandum, in advance of the April 26,
22 2024, evidentiary hearing in the above-captioned matter.

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This Evidentiary Hearing Memorandum is based upon the attached memorandum of points and authorities, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: April 25, 2024

Respectfully submitted,

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MACK E. JENKINS
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/s/ Aylin Kuzucan
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UNITED STATES OF AMERICA

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Petition and Amended Petitions on Probation and Supervised Release (collectively the "Petition") submitted by the United States Probation and Pretrial Services Office ("Probation") allege that defendant Abraham Salcedo ("defendant") committed nine violations of his supervised release terms, prior to the preliminary revocation hearing held on March 5, 2024. At his preliminary revocation hearing, defendant denied all violations; however, he stated his intent to admit to one allegation. The Court deferred the taking of the admission of the one allegation until the close of the evidentiary hearing. (Dkt. 14.) Each of the nine allegations state the same violation: "Having been ordered by the Court to refrain from any unlawful use of a controlled substance . . . Abraham Salcedo used methamphetamines, as evidenced by confirmed laboratory analysis of his urine sample." (Dkt. 8, February 29, 2024 Petition; April 18, 2024 Petition; April 22, 2024 Petition.) The Court ordered an evidentiary hearing on these allegations, now set for April 26, 2024. (Dkt. 14, 19.) This memorandum is intended to provide the Court with an overview of the government's witnesses and evidence, and to outline legal issues that may arise at the hearing.

II. PROCEDURAL HISTORY AND BACKGROUND

On June 3, 2022, defendant appeared before the Honorable Janis L. Sammartino, Chief United States District Judge of the Southern District of California, following a guilty plea to Importation of Fentanyl in violation of 21 U.S.C. §§ 952, 960 (Count 1); and, Importation of Methamphetamines, in violation of 21 U.S.C. §§ 952, 960 (Count 2). (Dkt. 4.) The Court sentenced defendant to 18 months

1 of imprisonment with three years of supervised release to follow.

2 (*Id.*)

3 On June 1, 2023, defendant began his supervised release term and
4 on June 13, 2023, his assigned probation officer, Javarie Johnson,
5 advised him of the standard and special conditions of his
6 supervision.

7 On that same day, defendant submitted a urine specimen to
8 probation that tested positive for methamphetamine. (Dkt. 8,
9 February 16, 2024 Violation Report at 2.) Defendant admitted to
10 using methamphetamine a day before he submitted the specimen. (*Id.*)
11 Probation modified defendant's supervision conditions to include
12 outpatient substance abuse treatment and counseling program and a
13 residential substance abuse treatment and counseling program. (*Id.*)
14 Defendant agreed to the proposal and consented to the modification.

15 (*Id.*). Subsequent to defendant's June 13, 2023 positive drug test,
16 defendant tested positive 10 times for methamphetamine based on urine
17 samples he submitted to probation on: October 3, 2023, January 10,
18 2024, January 18, 2024, January 19, 2024, January 23, 2024, January
19 25, 2024, January 27, 2024, February 1, 2024, February 10, 2024 and
20 February 21, 2024. (Dkt. 8, February 29, 2024 Petition; April 18,
21 2024 Petition; April 22, 2024 Petition.) When confronted with each
22 of the test results by Probation, Defendant denied using
23 methamphetamine. (April 22, 2024 Violation Report at 3-4.)

24 Probation then submitted each test to Alere Toxicology Inc.,
25 ("Alere") to confirm the finding that the urine submitted by
26 defendant tested positive for methphetamines. (See Dkt. 8, April
27 18, 2024 Petition, February 29, 2024 Petition). Based on Probation's
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1 own review and Alere's findings, Probation amended their Petition,
2 dismissing defendant's January 10, 2024, January 19, 2024, and
3 February 1, 2024, positive drug test violations. (April 22, 2024
4 Violation Report at 3-4; February 29, 2024 Petition at 2.) The
5 January 10, 2024, alleged violation was dismissed because of a
6 typographic error. In the original petition, Probation duplicated
7 the January 10, 2024, positive drug test violation, and inadvertently
8 double counted the allegation. (*Id.*) The amended petition correctly
9 cites to only one positive drug test violation on January 10, 2024.
10 (*Id.*) The January 19, 2024, alleged violation was dismissed based on
11 Alere's report that defendant's positive drug test results were
12 residual and not a product of a new use of methamphetamine. (April
13 22, 2024, Violation Report at 4-5.) Finally, the February 1, 2024,
14 alleged violation was dismissed based on Alere's finding that the
15 positive drug test submitted to their lab did not have detectable
16 quantities of methamphetamine. (*Id.*) Alere confirmed the remaining
17 positive drug tests submitted by Probation, and Probation concluded
18 that defendant tested positive for methamphetamine nine times between
19 June 13, 2023 and February 21, 2024. (*Id.*)

20 With the exception of defendant's admission on June 13, 2023, he
21 continues to deny Probation's allegations of his unlawful use of
22 methphetamines.

23 **III. ALLEGATION**

24 The Petition alleges that defendant, after having been ordered
25 by the Court to refrain from any unlawful use of a controlled
26 substance, used methphetamines, as evidenced by his one admission
27 and confirmed laboratory analysis of his urine samples, on or before
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1 June 13, 2023, October 3, 2023, January 10, 2024, January 18, 2024,
2 January 23, 2024, January 25, 2024, January 27, 2024, February 10,
3 2024 and February 21, 2024. The government will proceed to prove the
4 June 13, 2023, January 27, 2024, February 10, 2024 and February 21,
5 2024 violations.¹

6 **IV. GOVERNMENT WITNESSES**

7 To prove these allegations, the government intends to call two
8 witnesses -- Probation Officer Javarie Johnson and Certifying
9 Scientist Cheska Burleson -- at the evidentiary hearing, but reserves
10 its right to call additional witnesses should the need arise.

11 **A. Probation Officer Javarie Johnson**

12 Probation Officer Javarie Johnson has supervised defendant since
13 the defendant commenced his three-year supervised release term on
14 June 13, 2023. Officer Johnson will testify that: (1) he explained
15 the terms and conditions of defendant's probation to defendant on
16 June 13, 2023; (2) he collected and/or reviewed reports of
17 defendant's urine samples on June 13, 2023, January 27, 2024,
18 February 10, 2024 and February 21, 2024; and (3) defendant tested
19 positive for methamphetamine on each of the aforementioned dates.
20 Officer Johnson will further testify that he discussed these positive
21 drug tests with defendant for each date he tested positive, and that
22 defendant denied using methamphetamine. Officer Johnson will
23 additionally testify that, given defendant's denial of
24 methamphetamine use, he submitted each of defendant's urine specimen
25 to Alere to confirm that it, in fact, contained methamphetamine.
26 Finally, Officer Johnson will describe the policies and procedures of

27 ¹ The government reserves its right to prove the remainder of
28 the allegations, should the need arise.

1 the probation office when administering drug tests and confirming
2 positive drug test results.

3 **B. Certifying Scientist Cheska Burleson**

4 Cheska Burleson is the Technical Director at Alere Toxicology
5 Services, in Gretna, Louisiana. Ms. Burleson will testify that Alere
6 received defendant's urine specimens from Probation and handled them
7 in accordance with Alere's chain-of-custody protocols. She will
8 confirm the results of three of defendant's positive drug tests:
9 January 27, 2024, February 10, 2024, and February 21, 2024. Further,
10 Ms. Burleson will describe Alere's policies and procedures when
11 confirming urine-based drug tests for the probation office.

12 **V. GOVERNMENT EXHIBITS**

13 The government will move to submit the following exhibits:

- 14 1. Defendant's June 13, 2023, initial positive drug test
15 (Methamphetamine) administered by the United States
16 Probation Office;
- 17 2. June 13, 2023, United States Probation Office chain of
18 custody form;
- 19 3. June 13, 2023, defendant's signed admission to
20 consuming a prohibited substance (Methamphetamine);
- 21 4. January 27, 2024, initial positive drug test
22 (Methamphetamine) administered by the United States
23 Probation Office;
- 24 5. January 27, 2024, defendant's signed denial to
25 consuming a prohibited substance (Methamphetamine);
- 26 6. January 27, 2023, United States Probation Office chain
27 of custody form;
- 28 7. January 27, 2024, positive drug test confirmation by
Alere Toxicology Services, Inc. and Alere's chain of
custody form;
8. February 10, 2024, initial positive drug test
9. (Methamphetamine) administered by the United States
Probation Office;
10. February 10, 2024, defendant's signed denial to
consuming a prohibited substance (Methamphetamine);
11. February 10, 2024, United States Probation Office
chain of custody form;

11. February 10, 2024, positive drug test confirmation by
2 Alere Toxicology Services, Inc. and Alere's chain of
3 custody form;
12. February 21, 2024, initial positive drug test
3 (Methamphetamine) administered by the United States
4 Probation Office;
13. February 21, 2024, defendant's signed denial to
5 consuming a prohibited substance (Methamphetamine);
14. February 21, 2024, United States Probation Office
6 chain of custody form;
15. February 21, 2024, positive drug test confirmation by
7 Alere Toxicology Services, Inc. and Alere's chain of
8 custody form;
16. Defendant's United States Probation Office October
9 2023 Monthly Treatment Report;
17. Defendant's United States Probation Office November
10 2023 Monthly Treatment Report;
18. Defendant's United States Probation Office December
11 2023 Monthly Treatment Report;
19. Defendant's United States Probation Office January
12 2024 Monthly Treatment Report;
20. Defendant's United States Probation Office February
13 2024 Monthly Treatment Report;
21. March 7, 2024, Alere's report on defendant's residual
14 drug tests;
22. March 28, 2024, Alere's report on defendant's residual
15 drug tests;
23. January 27, 2024, Alere Toxicology Report, including
16 qualifications of chemist involved in confirming drug
17 tests, chain of custody forms, and confirmation
18 procedure and resulting data;
24. February 10, 2024, Alere Toxicology Report, including
19 qualifications of chemist involved in confirming drug
20 tests, chain of custody forms, and confirmation
21 procedure and resulting data; and
22. February 21, 2024, Alere Toxicology Report, including
23 qualifications of chemist involved in confirming drug
24 tests, chain of custody forms, and confirmation
25 procedure and resulting data.

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28 The government reserves its right to admit other exhibits,
should the need arise.

1 **VI. EVIDENTIARY STANDARDS GOVERNING REVOCATION PROCEEDINGS**

2 **A. The Government Must Establish Defendant's Violation by a
3 Preponderance of the Evidence**

4 The Court may revoke defendant's probation if it finds by a
5 preponderance of the evidence that defendant violated a condition of
6 his probation. 18 U.S.C. § 3583; 18 U.S.C. § 3565(a); *United States
7 v. Verduzco*, 330 F.3d 1182, 1184 (9th Cir. 2003) (noting that a
8 district court may revoke probation if it "finds by a preponderance
9 of the evidence that the defendant violated a condition of
10 [probation]"). "The standard of proof required is that evidence and
11 facts be such as reasonably to satisfy the judge that the
12 probationer's conduct has not been as required by the conditions set
13 by the court." *United States v. Guadarrama*, 742 F.2d 487, 489 (9th
14 Cir. 1984). With respect to revocation of probation and revocation
15 of supervised release, "the difference between the two proceedings,
16 for the purposes of applying evidentiary rules, is inconsequential."
17 *United States v. Walker*, 117 F.3d 417, 420 (9th Cir. 1997).

18 The government establishes an allegation by a preponderance of
19 the evidence when the Court is persuaded that the claim is more
20 probably true than not true. See Ninth Cir. Model Civil Jury Instr.
21 1.3: Burden of Proof--Preponderance of the Evidence. Although
22 preponderance of the evidence is a "[l]ower standard than the 'beyond
23 a reasonable doubt' standard required for a criminal conviction,
24 there must still be credible evidence the [probationer] actually
25 violated the terms of [probation]." *United States v. Perez*, 526 F.3d
26 543, 547 (9th Cir. 2008); accord *United States v. Hilger*, 728 F.3d
27 947, 949-50 (9th Cir. 2013) ("The government's burden of proof is

1 accordingly lower [than its burden of proof at a criminal trial]: it
2 must prove only a violation of the conditions of release by a
3 preponderance of the evidence.”).

B. Hearsay Is Admissible in Revocation Proceedings

5 Revocation proceedings are intended "to be 'flexible,'
6 reflecting their difference from a criminal prosecution." *Hilger*,
7 728 F.3d at 950 (citing *Morrissey v. Brewer*, 408 U.S. 471, 489
8 (1972)). Because "[r]evocation deprives an individual, not of the
9 absolute liberty to which every citizen is entitled, but only of the
10 conditional liberty properly dependent on observance of special
11 parole restrictions," *Morrissey*, 408 U.S. at 480, the Court is
12 permitted "to consider evidence . . . that would not be admissible in
13 an adversary criminal trial." *Id.* at 489.

To this end, a revocation hearing is an informal proceeding where the Federal Rules of Evidence do not apply. *United States v. Verduzco*, 330 F.3d 1182, 1185 (9th Cir. 2003) (citing *Walker*, 117 F.3d at 421) ("[T]he Federal Rules of Evidence do not apply to supervised release [or probation] revocation hearings."); *United States v. Simmons*, 812 F.2d 561, 564 (9th Cir. 1987) ("Less process is due at a revocation hearing, and that process must be flexible enough to allow the court to consider documentary evidence that may not meet usual evidentiary requirements."); Fed. R. Crim. P. 1101(d) ("The rules -- except for those on privilege -- do not apply to the following: . . . granting or revoking probation or supervised release[.]").

26 Nevertheless, the “[a]dmission of hearsay evidence in revocation
27 of [probation] proceedings is governed by the Fifth Amendment right

1 to due process." *Perez*, 526 F.3d at 548 (citing *Hall*, 419 F.3d at
2 985 n.4)). Accordingly, a probationer "is guaranteed the right to
3 confront and cross-examine adverse witnesses at a revocation hearing,
4 unless the government shows good cause for not producing the
5 witnesses." *Id.* (quoting *Hall*, 419 F.3d at 986) (cleaned up); see
6 also Fed. R. Crim. P. 32.1(b)(2)(C) (a probationer is entitled to "an
7 opportunity to appear, present evidence, and question any adverse
8 witness unless the court determines that the interest of justice does
9 not require the witness to appear"). In other words, "[t]he
10 defendant's right to confrontation is weighed under the specific
11 circumstances presented." *Walker*, 117 F.3d at 420 (cleaned up). "In
12 conducting the balancing test, the trial court may consider the
13 importance of the evidence to the court's finding, the
14 [probationer's] opportunity to refute the evidence, and the
15 consequences of the court's finding," as well as "the difficulty and
16 expense of procuring witnesses and the traditional indicia of
17 reliability borne by the evidence." *Id.*

18 The Ninth Circuit has found that hearsay testimony based upon
19 records maintained by another person at the witness's place of
20 business is admissible at a probation revocation hearing, where there
21 is no reason to doubt the reliability of the evidence and no contrary
22 evidence presented by the adverse party. *Id.* at 420 (holding that a
23 probation officer's hearsay testimony based upon records maintained
24 by another probation officer was admissible because the evidence
25 offered was reliable and the defendant offered no contrary evidence).

26 Alternatively, although the rules of evidence do not apply in
27 revocation proceedings, Federal Rule of Criminal Procedure 803(6)

1 also allows a record of an act, event, condition, opinion, or
2 diagnosis to be admitted if: "(A) the record was made at or near the
3 time by -- or from information transmitted by -- someone with
4 knowledge; (B) the record was kept in the course of a regularly
5 conducted activity of a business, organization, occupation, or
6 calling, whether or not for profit; (C) making the record was a
7 regular practice of that activity; (D) all these conditions are shown
8 by the testimony of the custodian or another qualified witness, or by
9 a certification that complies with Rule 902(11) or (12) or with a
10 statute permitting certification; and (E) the opponent does not show
11 that the source of information or the method or circumstances of
12 preparation indicate a lack of trustworthiness."

13 **VII. CONCLUSION**

14 After the evidentiary hearing, this Court should find that
15 defendant violated the terms of his probation based on defendant's
16 positive drug tests on June 13, 2023, January 27, 2024, February 10,
17 2024 and February 21, 2024.

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